VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,	)	
	)	
Plaintiff,	)	Case Nos: CR03-3089
	)	CR03-3090
v.	)	CR03-3091
	)	
LEE BOYD MALVO,	)	
	)	
Defendant.	)	

MOTION TO EXCLUDE CERTAIN VICTIM IMPACT TESTIMONY

Lee Boyd Malvo, by counsel, moves this court to exclude victim impact testimony from anyone other than those testifying about the death of Linda Franklin.

The Crime Victim and Witness Rights Act, Code of Virginia Section 19.2-11.01, grants a right to certain persons connected to victims to testify as to certain matters.[1] Under 19.2-11.01B, the term victim is defined as:

> (i) a person who has suffered physical, psychological or economic harm as a result of the commission of a felony or of assault and battery in violation of Section 18.2-57 or Section 18.2-57.2, stalking in violation of Section 18.2-60.3, sexual battery [etc.]..., (ii) a spouse or child of such a person, (iii) a parent or legal guardian of such a person who is a minor, (iv)... or (v) a spouse, parent, child spouse, sibling or legal guardian of such a person who is physically or mentally incapacitated or was the victim of a homicide;....

Case law has expanded the categories of persons who may provide victim impact evidence. *See* Thomas v. Commonwealth, 263 Va. 559 (2002) (testimony of victim's cousin and fiancé was admissible at sentencing phase of capital sentencing).

[1] By making this motion, we in no way intend to waive our prior objection to the use of any victim impact testimony. See defendant's Motion To Exclude Victim Impact Testimony, which was previously argued and denied by this court.

Once a victim is identified, he has the ability, "pursuant to Sections 19.2-264.4 and 19.2-295.3" to testify "prior to sentencing of the defendant regarding the impact of the offense." 19.2-11.01A(4)(c). As pertains to capital cases, Section 19.2-264.4 says that, "the court shall permit the victim, as defined in Section 19.2-11.01... to testify in the presence of the accused regarding the impact of the offense upon the victim. The court shall limit the victim's testimony to the factors set forth in clauses (i) through (vi) of subsection A of Section 19.2-299.1."

Section 19.2-299.1 says that:

> if prepared by someone other than the victim, the statement shall (i) identify the victim, (ii) itemize any economic loss suffered by the victim as a result of the offense, (iii) identify the nature and extent of any physical or psychological injury suffered by the victim as a result of the offense, (iv) detail any change in the victim's personal welfare, lifestyle or familial relationships as a result of the offense, (v) identify any request for psychological or medical services initiated by the victim or victim's family as a result of the offense, and (vi) provide such other information as the court may require related to the impact of the offense upon the victim.

In every pertinent section above, the testimony is limited to the impact of "the offense." In this case, both capital counts of the indictment identify Mrs. Franklin as the victim. Count I of the indictment states that on October 14, 2002, in Fairfax County, Lee Boyd Malvo did willfully,... etc. murder Linda Franklin in the commission of an act of terrorism. Likewise, Count II charges that on October 14, 2002, Lee Boyd Malvo murdered Linda Franklin, said killing being the killing of more that one person within a three year period.

Both of these indictments describe "the offense" as the murder of Linda Franklin. An indictment, under Code of Virginia Section 19.2-220, "shall be a plain, concise and definite written statement, (1) naming the accused, (2) *describing the offense charged*, (3) identifying the county, city or town in which the accused committed the offense, and (4) reciting that the accused committed the offense on or about a certain date...." (emphasis added).

The cases detailing what proof is necessary where the multiple killings statute is used make it clear that the real person in interest is the current person murdered. As opposed to the proof required for that offense, it is not even necessary that the defendant be the triggerman (or principal in the first degree) for the other, "gradation" killing.

For example, in Burlile v. Commonwealth, 261 Va. 501 (2001), the court said:

> We hold that Code § 18.2-31(8) does not require proof that a defendant charged with capital murder, in the premeditated killing of more than one person within a three-year period, was a principal in the first degree in each murder referenced in the indictment. Accordingly, we further hold that the jury need be instructed only that they must find the defendant was a principal in the first degree, or triggerman, in the principal murder charged and that he was at least an accomplice in the murder of one or more persons, *other than the victim* within a three-year period. Thus, the trial court did not err in refusing Berlile's instruction A.

261 Va. at 511 (emphasis added). The fact that the Virginia Supreme Court chose to characterize the named murder victim as the "principal murder," and "the victim," and referred to the gradation murders as "other than the victim," strongly suggests that only the principal murdered person is the victim.

Finally, if the Commonwealth were allowed to expand the scope of allowable victim impact testimony to those who are not the subject of the indictment, then such testimony might well be allowed from persons who were victims of a defendant's "other acts" crimes proven during the course of the trial. Such cannot be the case. The time to allow victim impact evidence from "gradation" victims is at the trial for the murder of that person, not here.

No Virginia case addresses this issue. However, the United States District Court for Massachusetts recently rule that the United States was prohibited from introducing victim impact testimony of the family members of a person killed by the defendant, which had been offered to prove an aggravating circumstance under the federal death penalty statute. The court limited

victim impact evidence to the family of the victim of the crime charged in the indictment. United States v. Gary Lee Sampson, No. 1-10284 (D. Mass. October 30, 2003), excerpt of transcript attached.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was hand delivered to:

Robert F. Horan, Jr., Esquire
Commonwealth's Attorney

and the original was delivered for filing to:

Clerk of the Circuit Court for the City of Chesapeake

and a true copy was delivered to the:

Hon. Jane Marum Roush
Judge Designate, Fairfax Circuit Court for the City of Chesapeake

this 15th day of December, 2003.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	CR 01-10384
v.	)	Boston, MA
	)	October 30, 2003
GARY LEE SAMPSON	)	

BEFORE THE HONORABLE MARK L. WOLF
UNITED STATES DISTRICT JUDGE
BOSTON SESSIONS

APPEARANCES:

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THE CLERK: This is Criminal Matter Number 01-10384, United States versus Gary Sampson.

Court is in session. You may be seated.

THE COURT: Good morning. Would counsel please identify themselves for the record.

MR. GAILIANO: Good morning, your Honor. Frank Gaviano, George Vien, and John Wortmann for the United States.

MR. RUBIN: Good morning, your Honor. For the defendant, Gary Sampson, David Rubin, Robert Shemtoff, and Stephanie Page, your Honor.

THE COURT: I'd like to talk to you about the agenda for today and following today.

Consistent with what we discussed Monday afternoon, there are some major issues that I'm prepared to discuss with you and, hopefully, decide substantially if not completely this morning. Those issues relate to the proposed victim impact evidence, the photographs, and future dangerousness and Doctor Cunningham.

I think a good amount of that discussion can properly occur in open court, and some of it will -- in order to hone in on some of the specifics and to minimize the risk that information that will be deemed to be inadmissible because it's unfairly prejudicial and its probative value is outweighed, it gets to the jurors

anyway through the media, some of the discussion I intend to conduct in the back. There will be transcripts of that. They can be unsealed, if necessary, soon, and certainly at the end of the case, if that's the appropriate time. But I want to promote as much candor as possible and conduct as much of this openly as possible and preserve the integrity of the trial as well.

I've also received some very significant filings very recently. It wasn't until last Friday that the objections to the voluminous exhibits were filed. It wasn't until after court on Monday that I received the transcript of almost 200 pages, I think, of Mr. Sampson's confession or confessions, the objections to those.

Yesterday, I received some information about the proposed openings, but not all the related documents. And there are some objections the parties have.

I have some other questions about what the parties propose to use in their openings and concerns.

I'm also concerned that there are human conditions that will arise when the reports on mental condition are exchanged tomorrow.

My present plan, and I won't finalize this until tomorrow, is that we won't start on Monday. I hope we'll be in a position to start on Tuesday.

But I want to address those three major issues

and, when they come in this afternoon, the Globe's motion today.

I need to do some more work, but I hope we can spend some time tomorrow addressing the admissibility of the verdicts in other cases and the motion to exclude them, some issues relating to the witnesses for next week.

But, basically, tomorrow or Monday, I want to take up the admissibility of other verdicts, the Miller-Katz issues -- not necessarily in this order -- the witnesses for next week and issues relating to the opening. I think those have an obvious urgency. There are the issues relating to the waiver of extradition and other matters. There's the issues relating to the bank robberies.

I haven't focused on it yet. Mr. Wortmann told me that the vulnerable victim instruction will be important to deciding the admissibility of some of the documents. I'll need to at least be educated on that.

We have the issue of the McCloskey demand letter, the view, substituting Doctor Evans for Doctor Weiner, and there's a government ex parte motion for a subpoena.

It's possible that some of these can wait until after the openings, but I don't know.

at least a quick glimpse and, in my view, more.

The video also emphasizes Jonathan Rizzo and his friends, but the impact of his loss on his many friends is not alleged in the notice of intent, and there's a risk that looking at the video, the jury would improperly consider that.

At best, the video is redundant, repetitive of the testimony and the photographs that will be presented to the jury, and would only serve to excessively inflame passion and sympathy and risk the fundamental -- endanger the fundamental fairness of the trial. So it's excluded.

Now, the victim impact evidence with regard to Mr. Whitney is the testimony of his son and his daughter, Brad Whitney and Jennifer Nebel, is that right?

MR. GARLAND: Yes, your Honor.

THE COURT: You may have spoken to this earlier, but who is Susan Whitney, and what is her proposed testimony?

MR. GARLAND: Susan Whitney is Mr. Whitney's wife, your Honor, and, frankly, at this point, we think she's too shaken up to testify.

THE COURT: All right. But you will need to let me know if you're going to call her so we can review these same questions.

MR. GARLAND: Yes.

THE COURT: Does the government have any case in which victim impact evidence regarding a victim of an uncharged murder was admitted?

MR. GARLAND: No, your Honor, nor is there a case that says that it can't come in.

THE COURT: Actually, there is. What about Gilbert versus State, 951 P 2nd 98, 116 to 117.

MR. GARLAND: Well, we've charged and you've allowed the Whitney homicide, the third homicide, as a stand-alone aggravating factor of uncharged misconduct. Our position on the testimony of the two children of Mr. Whitney is that in order for the jury to weigh the import of this as an aggravating factor, they need to know what harm the defendant caused. This is a weighing statute. It's much different, I would suggest, your Honor, if he had killed a person who had two children, who loved them, had a rich life, than he killed somebody else. And you hate to get to that, but that's the truth of it.

THE COURT: Well, let's think about this in terms of the statute. You know, you get very -- the argument that it goes to the weight --

MR. GARLAND: And the gravity.

THE COURT: It has some common sense appeal, but, but, first of all, you know, the statute talks about a specific kind of victim impact testimony. It talks

about -- I mean, it makes express provision of the aggravating factor to the effect of the offense on the victim and the victim's family. That's the Rizzo family and the McCloskey family.

There is no case and probably no federal case going either way -- I don't know of a federal case -- but, apparently, they have a lot of death penalty cases in Oklahoma, Louisiana, and Texas, but there are a lot of Oklahoma cases that I've been reading last couple of days interpreting the United States Constitution. In that case I just cited for you, I believe the Oklahoma court -- I forgot which court -- said it would be impermissible to let in victim impact evidence on an uncharged murder because it's basically unconstitutional, inconsistent with the Constitution. But I'll look at that.

MR. GARLAND: That's not binding on the court. But I think we can go back to what we've been arguing from maybe the first time we came to your courtroom, your Honor. It's important for the jury to understand what the defendant did in weighing his moral blameworthiness for these crimes. And essential to what he did is the fact that he killed Mr. Whitney, and Mr. Whitney left two children who have suffered a great deal of loss. And in order for them to understand or for the jury to understand the gravity of the defendant's acts,

it's the government's contention that they should hear from these family members so they can assess in context what this defendant did and why he deserves the death penalty.

MR. KOHNE: Your Honor, just as the government should not be allowed to allege victim impact evidence as an aggravating factor on top of the murders that are charged --

THE COURT: Just one second.

(Short pause.)

THE COURT: Go ahead.

MR. KOHNE: For example, the government could not or should not be allowed to argue that the manner in which Mr. Whitney was killed was heinous, cruel, and depraved or that it was accompanied by a substantial planning or premeditation. These are all aggravating factors that relate to the two charged homicides. The question is, what is one reason Mr. Sampson should be sentenced to death for the murder of Mr. Rizzo, what is one reason he should be sentenced to death for the murder of Mr. McCloskey is that he killed somebody else, and that's the aggravating factor.

To say that he should be sentenced to death because he killed somebody else and there was victim impact as a result of his killing somebody else or that

the somebody else he killed was in a manner that was heinous, cruel, or depraved is to take the statute and take it out of itself.

I can give you an anecdotal case.

THE COURT: Excuse me just a second.

MR. KUBEK: I can give you an anecdotal case, federal case, which illustrates the problem with there not being written opinions, United States against Walter Dias and Tyrone Walker, the Northern District of New York. My client, Tyrone Walker, two uncharged murders in the case, and the government at one point said they wanted to use victim impact evidence and basically withdrew it. There's no published opinion that's going to say that. Call my Judge Mulvey (sic) of the Northern District of New York, he might remember it, but there's nothing on the books --

THE COURT: But, basically, you're arguing that we don't find decisions because, in other cases, the government doesn't even try to do this.

MR. KUBEK: Hasn't tried, and the defendant hasn't -- it only comes up if the government tries to use it, if the judge rules that they may use it, and the defendant is then sentenced to death, and the appellate lawyer raises it on appeal. Otherwise, unless judges are writing on every decision, which I think perhaps they

should be doing more than they are --

THE COURT: In their spare time.

MR. KUBEK: In their spare time, yeah. I understand.

THE COURT: No, actually, I intend or I hope in some summary way to memorialize these decisions.

MR. KUBEK: Because it's a kind of unwritten common law of Federal Death Penalty jurisprudence. I know the federal system has no common law, but there is all kinds of decisions that are made that never reach the books, that never go beyond the memories of the lawyers who happened to be there to try the case.

So, you're right, there probably are no federal reported cases on this issue. I'm not aware of any. But it does happen, and it comes up, and this isn't the first or the last case where there has been unadjudicated murders in a -- not unadjudicated -- uncharged and unadjudicated murders in a case.

THE COURT: Just to clarify, the Gilbert versus the State was interpreting an Oklahoma statute and found that there wasn't impermissible victim impact evidence regarding an uncharged crime admitted because, although the judge called it victim impact evidence, it went to the discovery of the body of the person who was murdered in the uncharged crime.

So the -- you know, it may be -- I'm not sure -- I haven't read the Jencks yet, and I see they're on the list for next week -- it relates to whether that was going to be victim impact or fact testimony. I think Mr. Gesiano said it was hybrid. I mean, it may be, if that's relevant, it ought to come in, you know, what led up to the discovery of the body, and they went and they got a photograph and they brought it back. It may be the jury will know that Mr. McCloskey left loved ones, but -- and if so -- if they had testimony that was relevant to something else, it wouldn't be victim impact testimony, and it might come in.

But I'm going to exclude -- I am excluding the proposed victim impact evidence regarding Mr. Whitney. The Federal Death Penalty Act makes no express provision for it. Section 3593A says that aggravating factors may include factors concerning the effect of the offense on the victim and the victim's family. The offenses here are the carjackings that resulted in the murders of Philip McCloskey and Jonathan Rizzo. The murder of Robert Whitney is an aggravating factor, not an offense in this case.

The notice in this case states that the aggravating factor is the murder of Mr. Whitney in New Hampshire. There's no reference to victim impact in the

notice. This is not, however, material to my analysis. It's my sense that the government is required to give notice of aggravating factors and not all of the evidence it intends to introduce to prove a particular aggravating factor.

However, the proposed testimony does not tend to prove that Mr. Sampson murdered Mr. Whitney. That is undisputed, in any event, and the government will be allowed to introduce some evidence to bring that fact to life, I expect, including, for example, the video of the crime scene.

Basically, the proposed victim impact evidence has no probative value on whether the murder occurred. As the government has argued, it is arguably relevant to the weight to be given to the murder as an aggravating factor and, indeed, I think I expressed that view previously.

But as I discussed at the outset, the Supreme Court and others have recognized the risk that victim impact evidence will cause passion to overwhelm reason.

At the moment, as one would discern from the rulings I've made, I am liberally exercising my discretion to admit victim impact evidence from the families of Jonathan Rizzo and Philip McCloskey and not limiting the testimony at this point in any way to two

per family.

I find that allowing victim impact evidence regarding Mr. Whitney would create too great a danger, that the jury will be unduly influenced by sympathy and passion, will be unable to follow the law, and that the defendant will be denied due process.

I will say, it is not clear to me that the statute authorizes victim impact evidence regarding uncharged murders. The statute might be written the way it's written, recognizing the risk explained by the Supreme Court, striking a balance.

There seems to be no Federal Death Penalty Act case where such evidence has been admitted, although there seems to be no case that anybody has found that rules on it one way or another. It may be, as Mr. Rubino argues, that it's rarely if ever proffered.

But, in any event, I find it is not appropriate to permit the Whitney victim impact evidence in this case, even assuming without deciding that it would be uniquely permissible, that is, authorized by the Federal Death Penalty Act to do so.

So that evidence is excluded and may not be mentioned in the openings, and the associated exhibit, 36, I believe it is, is also excluded.

It's now 10:40. I think we'll take a brief

break for the -- well, actually -- we'll take a brief break for the court reporter.

When we resume, we'll go to the issue of the photographs, which as I'll explain, I think raises some legal issues that either haven't been discerned or developed.

MR. GAYLORD: If you'd allow either argument or us to reexamine exhibit number 36, your Honor. That's a photograph --

THE COURT: Actually, could I see 36.

MR. GAYLORD: That's just a photograph of Mr. Whitney when he was alive. I think it's -- and I don't even know if there's an objection raised to this or not -- if they're going to see photographs of Mr. Whitney tied to that chair, it's probably appropriate the jury see a photograph of him when he was alive. I think it's distinct from victim impact evidence, your Honor.

THE COURT: My understanding is there was an objection to exhibit 36 that was associated. What would it be probative of if not the impact on Mr. Whitney?

MR. GAYLORD: It shows who he is, your Honor. I think, frankly, if I can be candid, I think it's inhumane to have a trial where you can't have a picture of a person who was murdered when he was alive.

THE COURT: Well, I'm willing to -- that one

really hasn't been focused on and -- we're not having -- Mr. Gaylord, there can be a trial with victim impact evidence concerning Mr. Whitney. It can be conducted by the state of New Hampshire. It can seek the death penalty for Mr. Sampson. But the point is that the way the Federal Death Penalty works is that this is not a trial. The argument -- just sit -- about being inhumane -- this is not a trial about the death of poor Mr. Whitney. And if we want to have but one trial in this case, if you succeed in demonstrating that Mr. Sampson should be executed and really want that execution to occur, we all have to struggle to do what I think you have been struggling to do, to both effectively present the case and make sure there's no constitutional error in it and, you know -- but as a practical matter, that's what the risk -- the comment you just made illustrates precisely the risks that I'm concerned about. And I may not have articulated it in my analysis. But two victims -- there are two victims of the crimes in this case, and then there are some possible aggravating factors. And Mr. Whitney is certainly a victim, there's no doubt about that, but it would be -- while they can take Mr. Whitney's death into account in deciding the proper punishment for the murder of Jonathan Rizzo and the proper punishment for the murder of Philip McCloskey,

they can't punish -- the jury can't properly punish Mr. Sampson for murdering Mr. Whitney. And the way you express that argument really illustrates exactly what I was concerned about.

When I come back, we'll talk about the photographs.

MR. GAYLORD: Can I be heard further, your Honor? If you didn't like my word choice, I apologize for that, your Honor. I frankly wasn't prepared for you to exclude 36.

THE COURT: Hold on just a second.

MR. GAYLORD: I respect and abide --

THE COURT: This is going to be fluid. There are so many issues. I'm not telling you I won't reconsider that, but --

MR. GAYLORD: I just want -- I respect and abide by your decision, your Honor. I was talking about an innocuous photograph of the person when they were alive, that's all.

THE COURT: All right. But I do think -- I mean, and, actually, it illustrates -- you know, we've been doing this for a long time. We've seen these pictures -- well, you've seen these pictures before. I've just started to focus on some of them. And we're trying to be dispassionate about something that is